No. 89-373

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ALABAMA POWER COMPANY, *et al.*,
Petitioners,
v.
ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

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A divided panel of the Second Circuit held that the Environmental Protection Agency ("EPA") has a non-discretionary duty to conduct and complete "rulemaking" on whether or not to revise national ambient air quality standards for sulfur oxides under the Clean Air Act,[1] and that a district court has jurisdiction to enforce that purported duty under § 304(a)(2) of the Act.[2] The court made this holding notwithstanding the absence of anything in the Administrative Procedure Act[3] or the Clean

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[1] 42 U.S.C. §§ 7401, *et seq.* (1982) (hereinafter "Act").

[2] *Id.* § 7604(a)(2); *see Environmental Defense Fund v. Thomas*, 870 F.2d 892, 894, 900 (2d Cir. 1989) (hereinafter "*EDF v. Thomas*"), App. 1a, 4a, 17a.

[3] 5 U.S.C. §§ 551, *et seq.* (1988) (hereinafter "APA").

Air Act requiring EPA—or any agency—to conduct "rulemaking" where it decides that rules need not be made. Moreover, in the absence of any statutory requirement that the agency conduct rulemaking, the court below failed to defer to the agency's construction of the Act and instead "simply impose[d] its own construction on the statute." [4]

In his brief in opposition, the Administrator agrees with petitioners that "the court of appeals' failure to give appropriate deference and its erroneous imposition of a formal decision requirement . . . misapplies the legal standards" announced by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* [5] and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.* [6] The Administrator asserts, however, that "[o]n the precise issue" decided below, "there is no conflict of decisions." [7]

The brief for respondents Environmental Defense Fund, *et al.* (hereinafter referred to collectively as "EDF"), however, makes plain the importance of the issues raised by the Second Circuit's decision and the conflict posed by that decision with basic administrative law principles applied by this Court and the other circuit courts of appeals. EDF argues that "a final decision *not*

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[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

[5] *Supra* note 4.

[6] 435 U.S. 519 (1978); *see* Brief for the Administrator of the Environmental Protection Agency, *et al.* in Opposition, Nov. 1989, at 7 (hereinafter "EPA Brief"). Moreover, the Administrator agrees with petitioners that the Second Circuit's decision is "inconsistent" with decisions of other circuits because it holds that the plaintiffs in the present case were not required to seek an agency decision on their claims before they sought judicial intervention. EPA Brief at 5.

[7] EPA Brief at 7.

to revise a . . . [national ambient air quality standard] falls within the definition of a 'rule' under the Administrative Procedure Act and can *only* be determined by way of rulemaking procedures."[8] EDF argues that "[r]etention of the existing standards . . . is a rule" under the APA.[9] That is, the Second Circuit's decision, as construed by EDF, stands for the proposition that an agency determination to *retain* a rule must be subjected to the same procedures as an agency determination to *make* a rule. It is difficult to imagine a clearer contradiction of fundamental administrative law principles, the APA, and this Court's decision in *Vermont Yankee*.[10]

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[8] Brief for Respondents in Opposition, Nov. 6, 1989, at 10 n.7 (hereinafter "EDF Brief") (emphasis added). EDF cites *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983), *cited in* EDF Brief at 10 n.7. That case, however, required rulemaking where the agency sought to amend an existing rule. *See* 713 F.2d at 814-17, 818 (holding that the agency's suspension of the effective date of an existing rule was an attempt by the agency to promulgate a new rule). Here, in contrast, the agency has proposed *not* to amend existing rules, i.e., to keep the rules exactly as they are.

[9] EDF Brief at 10 n.7.

[10] EDF asserts that this issue was not before the Second Circuit and is not before this Court, on the grounds that when the Second Circuit issued its decision, EPA already had published a proposed decision not to revise the standards. *Id.* In addition, the Administrator suggests that "[i]t would be premature to conclude that" review by this Court is warranted, since "EPA's current practice . . . is to initiate a rulemaking and solicit public comment on proposed decisions not to revise national ambient air quality standards." EPA Brief at 6.

EDF and the Administrator misconstrue the nature of the question decided below and presented to this Court: Does a court have jurisdiction to *compel* an agency to conduct *and complete* a rulemaking—regardless of whether the agency has already published a proposed decision—where the agency intends to maintain the *status quo* and not to make or change a rule. Contrary to EDF's assertion, that is the very question decided below and presented here. Contrary to the Administrator's suggestion, there is no reason to

Further, EDF and the Administrator suggest that the decision below does not authorize district courts to review evolving scientific information and, on the basis of that review, to compel rulemaking.[11] The court below held, however, that scientific documents prepared by EPA "*triggered a* [*nondiscretionary*] *duty* on the part of EPA to address and decide whether and what kind of revision [to standards] is necessary." [12]

In addition, EDF is wrong in arguing that the decision below creates no conflict with the rule of preclusive court of appeals jurisdiction adopted by the District of Columbia Circuit in *Telecommunications Research and Action Center v. FCC* (*"TRAC"*)[13] and by the Ninth Circuit in an opinion by then-Judge Kennedy in *Public Utility Commissioner v. Bonneville Power Administration.*[14] EDF asserts that this rule is inapplicable here because "the Clean Air Act provides for a bifurcated system of judicial review." [15]

EDF ignores the D.C. Circuit's decision in *Sierra Club v. Thomas*, which held that the *TRAC* rule applies to

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believe that that question would be more sharply drawn in a case where, as was the case when this proceeding was before the district court, the agency had not voluntarily published a proposed decision not to revise rules. A court has no more authority to compel completion of an agency proceeding already begun than it does to compel initiation of such a proceeding.

[11] *See* EDF Brief at 10-11; EPA Brief at 6.

[12] *EDF v. Thomas*, 870 F.2d at 900, App. 17a (emphasis added); *see also id.* at 896, App. 9a (duty exists "[i]n view of" EPA's scientific documents); *id.* at 901 n.2, App. 21a (majority's "in view of" statement creates *"the necessary implication* that [district] courts . . . will review, to some undetermined extent, the substance of discretionary decisions by the Administrator") (Mahoney, J., dissenting) (emphasis added).

[13] 750 F.2d 70, 75 (D.C. Cir. 1984).

[14] 767 F.2d 622, 626 (9th Cir. 1985).

[15] EDF Brief at 13.

cases under the Clean Air Act,[16] and that § 304(a)(2) jurisdiction exists only where the Act "'categorically'" mandates that the Administrator take a specified action by a date-certain deadline.[17] Because the Act does not mandate, categorically or otherwise, that EPA conduct and complete rulemaking on a decision to keep an air quality standard as it is, the Second Circuit's decision conflicts with the principles applied by the D.C. Circuit in *Sierra Club* and *TRAC* and the Ninth Circuit in *Public Utility Commissioner*.

As the above discussion shows, the Court should review the Second Circuit's decision because it conflicts with the principles of this Court's decisions and those of other circuits and with fundamental principles of administrative law. Moreover, the Court should review the decision because it establishes a precedent that will harm petitioners' interests in future litigation and may result in EPA's acquiescence in the Second Circuit's erroneous view of the law.

In addition, petitioners urge review because the decision below, if allowed to stand, will seriously jeopardize the interests of petitioners that are at stake in the present case. A decision by EPA to revise the air quality standards could result in much more stringent—and costly—emission limitations for electric utility power plants operated by petitioners and their member companies, as well as for facilities in many other industries. Such a decision would, in turn, be more likely if petitioners were denied a full opportunity to present information and arguments to EPA demonstrating why EPA should not

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[16] *See Sierra Club v. Thomas*, 828 F.2d 783, 787-92 (D.C. Cir. 1987).

[17] *Id.* at 791 (quoting *Natural Resources Defense Council v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1975)).

revise the standards.[18] Because the Second Circuit's decision allows the district court to force EPA to end its proceeding prematurely, that decision may deny petitioners a full opportunity to convince EPA that revisions to the standards continue to be unwarranted.

Equally important, Congress is now considering amendments to the Clean Air Act that, if enacted, could greatly change the nature of the program for regulation of sulfur oxides and other substances under the Act.[19] A district court order compelling EPA to act on sulfur oxides while Congress is considering issues related to sulfur oxides regulation could result in precipitous administrative action adverse to petitioners' interests.

Respectfully submitted,

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[18] EPA has proposed not to revise the standards and has solicited public comments on that proposal, but has come to no conclusion on whether to make that proposal final.

[19] *See* EPA Brief at 7 n.2.